Mt. Carmel Hospital[1] *and* Service Employees Local 513, affiliated with Service Employees International Union, AFL-CIO, CLC. Case 17-CA-9642-2

April 10, 1981

DECISION AND ORDER

On December 31, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a brief in support thereof, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mt. Carmel Hospital, Pittsburg, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The name of Respondent appears as amended at the hearing.

[2] Although we believe the Administrative Law Judge found that employee Frakes was discharged on April 14, 1980, he did not expressly make such a finding. In order to avoid unnecessary confusion, we so find. On April 14, 1980, Frakes was handed a termination letter dated that day, which stated, "[Y]ou have been terminated from employment at Mt. Carmel, effective March 12, 1980." We note that the record indicates that the decision to discharge Frakes was made between April 3 and 11, 1980; that the decision was not implemented until April 14, 1980; and that Frakes did not receive notice of his termination until April 14, 1980. On the facts of this case, we find that Frakes was discharged on April 14, 1980, and that the termination letter does not alter the date of the discharge.

Chairman Fanning does not find it necessary to rely upon *District 1199, National Union of Hospital & Healthcare Employees, RWDSU, AFL-CIO (First Healthcare Corporation, d/b/a Parkway Pavilion Healthcare)*, 222 NLRB 212 (1976), in which he dissented. Member Jenkins would find *Pavilion Healthcare* to be inapposite on the facts because the proscriptions of Sec. 8(g) of the Act are directed at labor organizations and not at the actions of individual employees which is the situation presented here. Member Zimmerman agrees that *Parkway Pavilion Healthcare* is inapplicable to this case; he therefore finds it unnecessary to determine whether he would adhere to the principles enunciated in that decision were it to apply.

The Administrative Law Judge relied upon *Montefiore Hospital and Medical Center*, but inadvertently miscited the Board volume in which that case appeared. The correct Board citation is 243 NLRB 681 (1979).

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on November 6, 1980, at Pittsburg, Kansas, upon the General Counsel's complaint which alleged that on April 14, 1980,[1] the Respondent, Sisters of Saint Joseph's d/b/a Mt. Carmel Hospital,[2] discharged Dennis R. Frakes in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent contends that Frakes was discharged for cause—for engaging in the unprotected act of leaving his duty station on March 12 to join a strike by registered nurses. Frakes was not at the time a registered nurse and was not in the bargaining unit.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent (herein sometimes the Hospital) is engaged in the operation of a general hospital delivering inpatient and outpatient health care services to the general public living in the vicinity of Pittsburg, Kansas. In the course of this operation, the Respondent annually receives revenues in excess of $500,000, and annually receives directly from points outside the State of Kansas, goods, products, and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 8(g) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees Local 513, affiliated with Service Employees International Union, AFL-CIO, CLO (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

At all material times, the Union has been the exclusive collective-bargaining representative for a unit of the Respondent's registered nurses.[3] During the course of negotiations between the Union and the Respondent for a collective-bargaining agreement, the Union determined to engage in an economic strike beginning March 10, which intention was duly transmitted to the Respondent and the appropriate state and Federal agencies as required by Section 8(g) of the Act. The Union subsequently agreed to a 48-hour extension; and in fact commenced the strike at 9 a.m. on March 12. Sister Agnes Weber, the president and administrator of the Respondent, testified that there are approximately 80 to 85 nurses in the bargaining unit of which about 37 to 39 participated, at one time or another, in the strike.

[1] All dates are in 1980 unless otherwise indicated.

[2] The name of the Respondent appears as corrected at the hearing.

[3] The unit description is: All full-time and regular part-time registered nurses employed by the Respondent at the facility, excluding all office clerical employees, nurses' aids, LPNs, technicians, housekeeping employees, maintenance employees, food service employees, guards and supervisors as defined in the Act, and all other employees.

On March 12, Dennis Frakes was a licensed practical nurse (LPN) and had reported to work at 7 a.m. He was assigned to the intensive coronary care treatment unit along with 2 registered nurses, a nursing assistant, and the supervisor. When the strike deadline arrived, the nurses in the ICC unit determined to go out and Frakes joined them. As they were leaving work, Frakes was advised by his supervisor, Gene Salisbury, that he was "not covered."

Although at the time of the strike Frakes was a LPN and was not included in the bargaining unit, he had voted in the election the previous August because he was a "graduate nurse," which is a kind of limbo classification. That is, he had completed course work to become a registered nurse and had taken the state examination, but the result was not yet known. Subsequent to the election, Frakes was notified that he had failed the examination and pursuant to policy, the Respondent reclassified him as an LPN.[4] In February, Frakes again took the state examination and at the time of the strike had not yet been notified of the result. (In late March or early April he learned that he again had not passed. He took the test a third time in July and was successful.)

In the early hours of April 11, the parties reached an agreement. It was ratified, the strike ended, and the nurses returned to work on April 14.

On that day, Frakes came to work but was advised by Karen Bartol, the director of nursing services, that he was being discharged. In material part, the termination letter reads:

> This is to inform you that you have been terminated from employment at Mt. Carmel, effective March 12, 1980, because on that date you walked off your job and abandoned the patients assigned to you and for whom you had accepted responsibility at the start of your shift.

Sister Agnes, however, testified that the decision to discharge Frakes was made some time between April 3 and April 11 because as a nonmember of the bargaining unit he had left patients under his care. The decision to terminate Frakes was not made when the strike began because she did not know but what he might have passed the test and thus automatically have been in the bargaining unit.

B. *Analysis and Concluding Findings*

There is no question that Frakes joined fellow employees in a lawful strike. Nor is there any question that Frakes was discharged for having done so. To join others in a work stoppage where one is not directly involved is a sympathy strike. Such is protected by Section 7. Thus clearly and without more, the discharge of Frakes was violative of Section 8(a)(1) of the Act.

But the Respondent argues that employees of health care institutions may not strike in sympathy absent notice of their intent to do so. Since the notice here related only to the nurses, and did not indicate that Frakes or other nonbargaining unit employees might join in the strike, it did not protect him. Thus, the Hospital was privileged to discharge Frakes for leaving his job, particularly given the Hospital's need for continuity of patient care.

Section 8(g) applies to labor organizations, not employees. *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977). There the Board held that the 1974 health care amendments (Sec. 8(g), *et al.*) aimed to extend protection of the Act to employees of health care institutions. Thus, their rights as employees under the Act should not be limited absent explicit language requiring such a result. I find no language in the amendments which restricts an employee of a health care institution from enjoying his generally protected right to join others in a work stoppage even though he is not a member of the bargaining unit. While a labor organization must give notice before joining another in sympathy, *District 1199, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO (First Healthcare Corporation d/b/a Parkway Pavillion Health Care)*, 222 NLRB 212 (1976), Section 8(g) places no such requirement on individuals. *Montefiore Hospital and Medical Center*, 234 NLRB 633 (1979), enfd. in part 621 F.2d 510 (2d Cir. 1980).

Nor did Respondent demonstrate any factual justification for discharging Frakes. While the letter to Frakes suggested that he abandoned assigned patients, there is no evidence that the Hospital was damaged as the result of his action or any patient was placed in danger. Indeed, Salisbury testified that within 5 minutes two registered nurses who had not gone on strike were assigned to the intensive care unit. (Less than half of the bargaining unit nurses even participated in the strike.) Further, the Respondent did not decide to terminate Frakes until much later (apparently after learning that he had failed the test a second time) which suggests that his act of March 12 caused no particular problem. Sister Agnes testified that he was not terminated immediately because hospital management thought he might have passed the test and thus have been in the bargaining unit. In short, the Respondent's decision rested upon the technical fact of whether Frakes had passed the examination and not whether his absence was in any way damaging to the Respondent or any patient.

Accordingly, I conclude that the Respondent has not sustained its burden of establishing sufficient justification for discharging an employee who engaged in activity otherwise protected by Section 7 of the Act. By discharging Dennis Frakes because he joined the strike of registered nurses on March 12, the Respondent violated Section 8(a)(1) of the Act.

In joining the nurses' strike on March 12 Frakes became an economic striker and therefore, as with the nurses, could have been permanently replaced. Such, however, was not the case. The Respondent did not permanently replace Frakes, it discharged him.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The Respondent's unfair labor practice described above, occurring in connection with its business, has a

[4] The General Counsel does not contend that the reclassification of Frakes was in any way violative of the Act.

close, substantial, and intimate relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent unlawfully discharged Dennis Frakes, I shall recommend that it be ordered to cease and desist from such activity, offer him immediate reinstatement to a position of registered nurse, a position he would have held after September 5, 1980, but for his discharge, and make him whole for any loss of wages and other benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Sisters of St. Joseph's d/b/a Mt. Carmel Hospital, Pittsburg, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they engaged in a strike or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.[7]

2. Take the following affirmative action:

(a) Offer immediate reinstatement to Dennis R. Frakes to a position of registered nurse or, if such position no longer exists, to a substantially equivalent position of employment and make him whole for any loss of wages or other benefits he may have suffered as a result of his discharge pursuant to the formula set forth in the remedy section above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Pittsburg, Kansas, facility, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[5] See, generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] There is no indication in this record that the Respondent has a proclivity to engage in unfair labor practices or indeed has any particular animus against the Union or any other labor organization. Accordingly, I find that the narrow injunctive order is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge any employee because that employee joins in a lawful strike or other concerted activity protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Dennis R. Frakes immediate reinstatement to the position of registered nurse and WE WILL make him whole for any loss of wages or other benefits he may have suffered as a result of the discrimination against him, with interest.

SISTERS OF SAINT JOSEPH'S D/B/A MT. CARMEL HOSPITAL